No. 12,393

IN THE

United States Court of Appeals

For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation),

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

REPLY BRIEF TO BRIEF OF APPELLEES AND ANSWERING BRIEF ON CROSS-APPEAL.

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PRELIMINARY STATEMENT.

This case arises out of an alleged sale of property by appellees to the appellant company on or about March 24, 1948. Since the Honorable Court below found that there was no express contract of sale, it became necessary for appellees to prove an implied sale as a result of appellant's taking possession of ap-

pellees' property. The situation is complicated by the fact that in June, 1948, Mr. Morgan, president of appellant company, and Mr. Agostino, representing the appellees, entered into an oral agreement for the sale of the property involved in this case, which agreement was reduced to writing by Mr. Agostino's attorney. (Tr. 462.)

After this June agreement, and in reliance thereon, appellant actually took possession of the property until it was notified by appellees that the appellees revoked the contract (Tr. 196, 392), whereupon ap-appellant returned the property.

Appellees did not sue on the contract of June, 1948, but during the trial many loose statements were made to the effect that appellant took possession of the property. With the possible exception of appellant's having a crew land a scow in an unoccupied portion of a tideland pond, however, there is no evidence of appellant's taking possession of any of the appellees' property on or about March 24, 1948. Much of the conflict in the evidence can be resolved by noticing the pertinent dates involved; that is, the date of the implied sale, March 24, 1948, on which appellees base their entire case, and the date of the contract of sale repudiated by appellees, June, 1948. It then becomes apparent that there was no evidence to support the verdict of the jury since: (1) To establish an implied sale, appellees had to prove possession by appellant and there is no evidence of such possession by appellant on or about March 24, 1948; (2) Appellant took possession only after and in further-

ance of the contract of June, 1948; and (3) The contract of June, 1948, was repudiated by appellees.

Appellant respectfully disagrees with appellees' interpretation of the evidence set forth in the statement of fact in appellees' brief; but since this Honorable Court is well able to ascertain the true facts from the record and exhibits, no further statement will be made other than to mention the obvious tactics of appellees in attempting to distort the evidence so as to create sympathy for themselves and to vilify the appellant.

Appellant feels that an impartial reading of the evidence will show that appellees, having finished logging at Barry Arm, were determined to keep appellant out of the area unless an exorbitant price was paid to appellees for property not needed by the appellant. The evidence further shows that appellant, far from attempting to cheat appellees out of their property, made no false representations; and that, when a contract was entered into in June, appellant in good faith attempted to complete the agreement until the absence of appellees' attorney and appellees' revocation of the contract caused appellant to withdraw at considerable loss.

ARGUMENT.

I.

THERE WAS NO EVIDENCE TO SUPPORT THE VERDICT OF THE JURY, WHICH VERDICT WAS MANIFESTLY AGAINST THE EVIDENCE AND WAS THE RESULT OF PASSION, PREJUDICE, SYMPATHY, OR MISTAKE.

Counsel for appellees have taken the liberty of labeling appellant's first point as the one principally relied upon for reversal. While appellant feels that the verdict was not supported by the evidence, this point is by no means the only basis for reversal, as was made clear by appellant's brief in main.

Counsel, in answering the first point raised in appellant's brief, quoted from a portion of the trial judge's oral opinion on defendant's motion for a directed verdict at the close of plaintiffs' evidence in chief. (Appellees' Brief, page 27.) This statement of the trial Court, which was made before the appellant presented any evidence and therefore was based entirely on appellees' testimony, of course has no bearing on the legal argument as to whether there was adequate evidence to support the verdict of the jury and has been inserted for the sole purpose of attempting to prejudice appellant with this Honorable Court.

The legal propositions stated in appellant's brief in main are so well established that no further authorities need be cited in their support. Appellees apparently find fault with the cases cited for not involving the same factual situation as the subject case. Obviously the factual situation in the subject case is unique; but, when the well-established principles of law in regard to reversing verdicts not supported by

the evidence are applied to this case, it is appellant's respectful contention that the verdict in this case should be set aside.

The crux of the argument in regard to whether there is evidence to support the verdict of the jury in this case depends on whether the evidence, when most favorably viewed from appellees' standpoint, proves an acceptance of the property by the appellant *on or before March 24, 1948.* It is significant that appellees in their brief show no taking of possession other than by general statements applicable to the admitted possession under the June contract.

The evidence reveals that all that appellant did prior to July, 1949, was to authorize a logging crew to land in the unoccupied tidal waters at the mouth of Mosquito Creek. This action of appellant cannot be construed as a taking of possession of appellees' property so as to make appellant liable on an implied in fact contract of sale. Accordingly, the verdict is not supported by the evidence and should be reversed.

II.

THE HONORABLE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 5 OVER APPELLANT'S OBJECTION, SINCE THAT INSTRUCTION PERMITTED THE JURY TO CONCLUDE THAT LANDING A SCOW IN THE UNOCCUPIED PORTION OF A TIDEWATER POND, IN WHICH APPELLEES HAD PLACED A FEW PILINGS, CONSTITUTED A TAKING OF POSSESSION OF APPELLEES' PROPERTY BY APPELLANT SO AS TO COMPLETE A SALE.

In answering appellant's argument on this point, appellees make numerous statements as to the factual situation without support of references to the transcript. Appellant must respectfully disagree with appellees' statement of facts in regard to the tidewater pond in which a scow owned by appellant was landed by Mr. Lambert. As mentioned in appellant's opening brief, the evidence was conflicting as to the nature of this tidewater pond and the improvements made to it, if any. Mr. Agostino stated that approximately thirty hand-driven piles had been placed in a portion of the pond, but that no other work had been done upon the pond. (Tr. 162, 163.) Despite appellees' brief to the contrary, (see page 37 thereof), Mr. Agostino himself expressly testified that there were no improvements surrounding the pond. (Tr. 184.)

Mr. Morgan testified in regard to the pond as follows:

> "* * * there was no piling except a few little set posts in front of the so-called saw mill." (Tr. 409.)

Pictures of the pond were introduced into evidence by the appellees (see Exhibits 4, 10, 12, 16, 17, 19 and 24), and this honorable Court may judge for itself

from these exhibits and the testimony as to the actual nature of the improvements placed there by appellees. In any event, there was not one particle of evidence indicating that the scow was landed or that appellant took possession of a portion of the pond on which there were improvements placed by appellees.

In the face of the conflict of evidence in regard to the nature of the pond, and the necessity for the appellees to prove that appellant took possession of appellees' property on or about March 24, 1948, the trial Court's instruction in regard to the effect of the scow's landing in a portion of the pond became of paramount importance. The instruction as given hinged on the definition of "actual possession", which the Court stated gave a superior right to the tidelands. Instruction No. 5 defined actual possession as follows:

> "Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right provided there is real and actual possession."

Admittedly there were some pilings placed in a portion of this natural tidewater pond by the appellees. The Court's instruction, by stating that actual possession is manifested by pilings without further explanation to the effect that a few pilings in a portion of the pond would not give a superior right to the entire pond, was tantamount to permitting the jury to find for the appellees even though the jury found that appellant merely landed a scow in an unoccupied portion of a tidewater pond.

Appellees, in their brief, apparently question the taking of proper exception to the trial Court's instruction. In addition to submitting two requested instructions which correctly state the law (Defendant's requested instructions number XX (Tr. 64) and XXVI (Tr. 67), counsel for appellant, in the portion of the transcript quoted by appellees in their brief at pages 44 and 45, expressly excepted to the Court's instruction on this point. It is also to be noted that exception was taken to the Court's refusal to give instructions numbers XX and XXVI.

The cases cited by appellees in an attempt to justify the Court's instruction all deal with littoral rights and are inapplicable to the subject case since appellees were not in possession of the upland property abutting on these tidelands. This is made clear by Mr. Agostino's testimony in regard to appellees upland improvements. He stated:

> "Q. Where was the pond or log pond as you call it, where was that with reference to your regular camp?
>
> A. It is a thousand feet from the bunkhouse on the east side." (Tr. 163.)

There was no showing of any possession of upland property closer to this pond than one thousand feet. Certainly appellees had no littoral rights which were involved in this suit.

The case of *Young v. Fitzgerald,* 4 Alaska 52, cited by appellees, involved an upland owner whose ingress and egress from his property was blocked by pilings placed by the plaintiff. The Court held, at page 55:

> "* * * that such piles in the condition they were left by the plaintiff were calculated to interfere and obstruct the free access of the defendants from their upland holdings to such navigable water across the shore land."

And at page 56, the Court stated:

> "There was no evidence * * * whatever that they had ever been divested of any littoral right.
>
> The piles placed in the shore by the plaintiff interfered with defendant's free access to the waters of Gastineau Channel * * *."

Similarly, the case of *McKloskey v. Pacific Coast Co.,* 160 Fed. 974, deals entirely with the question of littoral rights and interference of an upland owner's right of ingress and egress.

The other case cited in appellees' brief, *Decker v. Pacific Coast S. S. Co.,* 164 Fed. 974, while also dealing with littoral rights, is directly adverse to appellees' contentions. It is stated in the first syllabus of that case as follows:

> "An owner of lands in Alaska which border on tidal waters has no title to the soil below high-water mark, and cannot enjoin the maintenance of a wharf or other structure in aid of navigation thereon, unless it prevents his own free access to the navigable waters."

Appellant, in arguing point number two in its brief, pointed out the Court's failure to instruct on the paramount rights of the United States and those holding rights granted by the government to tidelands and unoccupied portions of the public domain. This was of

importance since appellant had a government permit to go upon the lands involved in this suit and to cut timber thereon (Tr. 281, 282), and there was evidence to show that appellees had no timber permit in March of 1948. (Tr. 311.) Appellant expressly excepted to Instruction No. 5 for that reason. (Tr. 638, 639.)

Appellees do not deny that an instruction should have been given on this point but attempt to circumvent this error by stating that no exception was taken on this ground. Apparently counsel overlooked the fact that when Instruction No. 5 was first given, counsel for appellant excepted as follows:

> "Mr. Davis. I would like then to except to the latter paragraph of that Instruction 5 insofar as the talked about claim of possession without defining what 'possession' is and on the ground we had with plaintiffs equal right to use those tidelands with the plaintiffs except insofar as they have excluded them from the public domain.
> Mr. Boochever. There is nowhere stated—It states in line 11 that if you find in this case that plaintiffs were in the actual possession and use of any tidelands then in that event they were entitled to remain in possession thereof as against all other claims or claimants seeking possession of such tidelands from the plaintiffs, because it is a well established law that the United States has paramount title to the tidelands and a right under the United States.
> The Court. If you mention the United States and mix it up in this it is just one more thing for the jury to consider and the United States is not involved in this case at all. Counsel is quite correct as to the law but I don't see how—why the in-

struction should properly make that exception in the case of the United States.

Mr. Boochever. Well, at least as far as the public lands above tidelands, the rights of the United States are of great relevancy and the rights of each, we feel, is very essential, which should be stated in this case as it goes to the very essence of this argument.

The Court. I think that is covered in the last part of 5. However, you have your exception."

It thus appears that the honorable trial Court erred in giving its Instruction No. 5, both in regard to its definition of the type of possession giving a superior right to tidelands and in regard to its omission of any reference to the paramount rights of the United States and one having a permit from the United States to unoccupied portions of tidelands and the public domain.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

Counsel for appellees do not dispute the fact that as a matter of law Kenneth Lambert was an independent contractor at all times after April 1, 1948. Their answers to the contention that the Court was in error in leaving this question to the jury by virtue of its instruction 6D (Tr. 88 and 89), are that the point is

immaterial, the Court's instruction thus amounting to harmless error; and secondly that no proper exception was taken to the Court's instruction on this point. In addition counsel make the same irrelevant and mistaken accusations against the appellant which appear throughout the brief for appellees.

Mr. Morgan is accused of attempting to cheat appellees out of their property. The evidence to the effect that appellant did not want appellees' property, that it had a valid right granted by the Forest Service to cut timber in the area in dispute, and that, until the contract of June, it never considered itself to have purchased any of appellees' property and had expressly forbidden anyone associated with appellant to use that property, is completely disregarded. So is the evidence that appellees had no further intention of logging in the area and were attempting in effect to "hold up" appellant in an effort to secure an exorbitant price for property of no further value to appellees. Of course these considerations have no basis for being a part of a legal appeal brief but, in view of appellees' loose statements, appellant feels obliged to mention them.

Counsel for appellees state that Mr. Hooper, an employee of Columbia Lumber Company, was living in the cook house and bunk house at the time of the trial, without pointing out that Hooper testified that he was living there by express permission of Mr. Agostino. (Tr. 341, 342.)

They further state as a fact that appellees' timber to the northwest of their camp was all cut and that

the logs went to the Columbia Lumber Company; although the testimony of Mr. Jacobson, the Forest Service supervisor, was that this timber had not been completely cut even at the date of the trial. (Tr. 285.) Furthermore, the testimony was uncontradicted that Mr. Morgan, president of appellant company, instructed Lambert not to use any of appellees' property (Tr. 375, 533 and 598) and that Lambert was never given authority by Columbia Lumber Company to cut appellees' timber. As a matter of fact, Mr. Jacobsen, supervisor for the Forest Service, and Mr. McAllister both testified that appellees' timber was not cut; but assuming, as contended by appellees, that it was, certainly the status of Mr. Lambert at the time of the cutting was material.

He testified:

"A. I started falling timber on the 6th day of April.

Q. From then on you were on your own as a contractor?

A. Yes." (Tr. 263.)

Counsel for appellees argued throughout the trial, and even in their brief on appeal, that certain timber of appellees was cut by appellant; and it appears strange that now for the first time they raise the argument that it was immaterial whether Lambert was an independent contractor or an employee of appellant at the time this timber was allegedly cut.

Moreover, considerable point was made of the fact that Lambert had borrowed or taken some barrels of oil from appellees. This fact impressed the jury to

such an extent that a juror specifically asked a question concerning those barrels (Tr. 435), and counsel for appellees mentioned them as the property of appellees used by Lambert.

Moreover, the honorable trial judge was of the opinion that the question of whether Lambert was an independent contractor after April 1 was sufficiently material to warrant an instruction, and counsel for appellees did not object that this instruction was unnecessary. Surely appellant was entitled to a correct instruction, explaining to the jury that after April 1, 1948, Lambert was an independent contractor whose actions, except where expressly authorized, were not binding on appellant.

The only other answer advanced by appellees to this error of the trial Court is so patently specious as hardly to warrant a reply. Although counsel for appellant repeatedly raised the objection of Mr. Lambert's status throughout the trial, submitted instructions to the Court correctly stating the law as to his status (see Defendant's Requested Instructions, No. XIV (Tr. 62) and XXIV (Tr. 66, 67) and record of exceptions taken, signed by the trial judge), and expressly excepted to the Court's leaving this question to the jury after the Court's instructions had been given to counsel (Tr. 643, 644), the learned counsel for appellees are so wanting of a valid answer to this point that they state:

> "to raise a backhand question of this kind for the first time, in the appellate court, would be extremely unjust to the trial judge." (Brief of Appellees, p. 49.)

It is hard to imagine how the objection to the Court's failure to instruct as to Mr. Lambert's status as an independent contractor could have been more forcibly drawn to the trial judge's attention, and it is respectfully submitted that the Court's error in failing so to instruct the jury materially prejudiced appellant and may well have been the reason for the jury's erroneous verdict.

IV.

THE ALLEGED ORAL CONTRACT OF SALE OF MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE; AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

Appellees do not argue with the legal authorities cited by appellant in support of their contention that the alleged oral contract of sale of March 24, 1948, was unenforceable under the provisions of Section 29-1-12 ACLA 1949; but contend there was a delivery of the property to appellant and an unequivocal acceptance by it. Since the facts of this case have been discussed at some length, it will suffice to state that once the distinction is made between the actions of appellant on or about March 24, and its actions after the admitted contract entered into in June, 1948, it becomes apparent that "on or about March 24, 1948"

appellant never accepted the property "by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner." *Hinchman v. Lincoln,* 124 U.S. 38.

Counsel for appellees state that there is no better settled rule of law than the portion of the Court's Instruction No. 4 objected to by appellant, which stated:

> "Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of property may in law, if proved, be just as valid and enforceable as though it were written."

They cite no authorities, allegedly for the reason that they "would not want to insult the intelligence of this high Court". (Brief of Appellees, p. 49.)

Appellant, nevertheless, is obliged to state that it has been unable to discover authorities in support of appellees' contention in that regard, where as in the subject case it is undisputed that the property alleged to have been sold is of a greater value than $500.00 and the provisions of the Statute of Frauds require such contracts to be in writing.

An oral contract of sale would be proved when there is undisputed testimony as to the words constituting the agreement to buy and sell. Yet, can it be contended that such an oral contract in and of itself is "valid and enforceable" where a Statute of Frauds requires such contracts to be in writing?

Despite the opinion of learned counsel for appellees, appellant believes that the trial Court erred in

giving the above quoted portion of Instruction No. 4, and it is to be noted that this opinion is substantiated by *Corpus Juris* as follows:

> "A contract of sale must be in writing where it comes within the provisions of the Statute of Frauds, relating to the sale of goods, wares, and merchandise, which provisions are, in some jurisdictions now embodied in statutes adopting the Uniform Sales Act." 55 *C. J.* 188.

See also *Ft. Dearborn Coal Co. v. Borderland Coal Sales Co.,* 7 Fed. (2d) 441, and cases cited in appellant's opening brief, page 45.

V.

ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

In answer to appellant's Argument V, appellees again resort to sophistic reasoning. The legal authorities cited by appellant are not disputed; but appellees base their answer on an interpretation of the evidence intended to show that Mr. Morgan did not sign the contract entered into in June, 1948, and reduced to writing by Mr. Agostino's attorney, Mr. Butcher. As pointed out in appellant's opening brief, it was immaterial whether the contract was signed by appellant in

view of its letter of July 19, 1948, and its actions under the contract. In any event, however, Mr. Morgan testified that he did sign the contract (Tr. 403); but appellees apparently believe it is of great significance that while in appellant's answer it is stated that Mr. Morgan signed the contract "on or about the 10th day of July, 1948" (Tr. 23), (not "on the 10th day of July, 1948" as stated in Brief of Appellees, p. 53), in cross-examination Mr. Morgan answered the question as to when he signed the contract, as follows:

> "A. The exact date would be hard to state because it was some time in July." (Tr. 403.)

The specious argument is made that the contract is dated July 29, 1948. This date was explained by all parties involved as being in error, the correct date being June 29, 1948, as admitted on page 12, Brief of Appellees.

Appellees' counsel also considers it significant that in writing to Mr. Butcher on July 19, 1948, Mr. Morgan stated that he had signed a check in the sum of $3300.00 and left it with Mr. Summers, while later he testified that he had signed checks in the sum of $5000.00 and left them with Mr. McCarrey. Mr. Morgan explained that additional checks which would become due within the month were signed and left with Mr. Schmidt, who took care of the matter in place of Mr. Summers, and that they were to be delivered to Mr. McCarrey so that they would be available when due. (Tr. 386 to 388.) Of course, it was only necessary to refer to the check for $3300.00 in the letter to Mr. Butcher. This check was to be paid to

the Clerk of the Court through Mr. Butcher; and the testimony is clear that Mr. Morgan did all within his power to contact Mr. Butcher personally and that, when that failed, Mr. Morgan wrote him a letter expressly accepting the contract and providing for the payment of the check in the sum of $3300.00 as soon as a list of the property was furnished. (Tr. 385.) It is true that Mr. Morgan stated in the letter of July 19th, written after he had failed to meet with Mr. Butcher due to the latter's absence, that Mr. Butcher "would not expect me to sign it without a definite understanding as to what the $10,000.00 is going to purchase." This, however, is not inconsistent with his having signed the contract and left it with his agent together with instructions that it was not to be delivered until the list was furnished.

Mr. Morgan specifically stated in this letter:

> "I have signed a check in the sum of $3300.00 and left it with Mr. C. D. Summers with instructions to pay it to the clerk of the court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract."

That is hardly the type of letter and the course of action that would be taken by one attempting to get out of paying under a contract; since it, together with appellant's actions in taking possession of the property under this contract in July, 1948, obviously made the agreement binding on appellant had not the appellee revoked it.

The terms of the contract having been orally agreed upon, reduced to writing, signed by Mr. Agostino for

the appellees, and accepted by the appellant by its taking possession of the property and by its letter of July 19, 1948, it was error for the trial Court to permit testimony of a prior inconsistent oral agreement.

VI.

THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

Appellees' principal answer to appellant's argument VI is based upon the contention that Mr. Lambert had previously testified as to the contents of the telegram. When Mr. Lambert testified originally, the cause of action was based upon an express contract. What appellees actually owned was not of paramount importance. It was for this reason that no objection was made to Mr. Lambert's original testimony about the contents of the alleged telegram extending Mr. Agostino's timber permit. At that time the testimony appeared to be immaterial.

On Mr. Lambert's redirect testimony, the cause of action had been amended to one based on *quantum valebant;* and, since part of appellees' contention on this theory was based on the allegation that appellant had cut some of appellees' timber, it became of importance to show whether appellees had a right to that timber at the time of the alleged taking. Thus Mr. Jacobsen, the Forest Service Supervisor of this area, testified that appellees' timber permit had expired on December 31, 1947, and that an extension was not

granted until midsummer of 1948, after the date of the alleged implied sale. (Tr. 311.)

Since the point now was of significance, appellant objected to the questions asked Mr. Lambert on redirect examination as to the contents of this alleged telegram. Objection was first made on the grounds that it was improper rebuttal testimony. The honorable trial Court erroneously overruled this objection. (Tr. 583.) The question was then objected to on the grounds that testimony by Mr. Lambert as to the contents of an alleged telegram written by someone in the Forest Service was hearsay. Again the objection was overruled, and this incompetent testimony was allowed.

Counsel for appellees apparently take the position that appellant's counsel, after having their objections overruled, were required to repeat their objections when the question was repeated after the Court's ruling. Were this a requirement, trials might last endlessly with a question being asked, objection made, overruled by the Court, question repeated, objection being made again, etc., *ad infinitum.*

The reference to 20 Am. Jur. 414, cited by appellees, admittedly is an accurate statement of the law where a telegram is admissible; but it in no way alters the hearsay rule; and secondary evidence as to the contents of a telegram are not admissible where the telegram itself would be inadmissible as containing a written statement made by one not a party to the suit. (See cases cited in appellant's opening brief, pages 52, 53.)

Of course, it is imposible to ascertain definitely what evidence materially affects the decision of a jury; but it is probable that the Court's error in admitting this testimony just prior to the conclusion of the case prejudiced appellant; and it is respectfully submitted that the admission of this testimony constituted reversible error.

VII.

THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED, SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

Appellees rely on the provisions of the Rules of Procedure of the District Courts of the United States in attempting to answer point VII of appellant's brief. These rules, however, did not become applicable to the Territory of Alaska until July 18, 1949. (See 48 USCA, Section 103a.) Accordingly, at the time of this trial in June, 1949, the District Court for the Territory of Alaska was governed by the provisions of Section 55-5-76, ACLA, 1949, in regard to amendments of pleadings. As set forth in appellant's opening brief, it is respectfully submitted that the amendment from a cause of action based on express contract to one based on *quantum valebant* was a substantial change. Appellant was not prepared to submit evidence as to the value of the property in question and accordingly was prejudiced by the allowance of this amendment.

VIII.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN AND TO STRIKE PORTIONS OF APPELLEES' REPLY; SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

Appellees apparently do not dispute the fact that the matters objected to in appellant's motions to strike were improper and prejudicial. These motions as well as the amended pleadings to which counsel refers as a "monstrosity" had to be prepared during the course of the trial as a result of the amendment of appellees' amended complaint. Argument was had in regard to the motion addressed to the Second Amended Complaint and the trial Court denied the motion. (Tr. 299-300.) The motion to strike portions of the reply required no argument. Moreover, the trial Court waived any such requirement on the part of counsel to request a hearing on this motion, as appellees apparently contend was necessary.

> "Mr. Boochever. May it please the Court, we were served with a reply in this matter this morning and we are preparing a motion in regard to that reply. It hasn't been typed yet. I must advise Your Honor of that fact.
>
> The Court. All of these matters may be considered as having been presented and argued and disposed of before the case is finally disposed of. Counsel will preserve that right." (Tr. 377.)

It is again respectfully submitted that the matters contained in the Second Amended Complaint and

Reply which were made the subject of Motions to Strike submitted in writing by the appellant were highly prejudicial, and it was error of the honorable trial Court to deny these motions and permit the improper and damaging portions of the pleadings to go to the jury during its deliberations.

ANSWER TO CROSS-COMPLAINT.

I.

THE ALLOWANCE OF ATTORNEYS' FEES BY THE TRIAL COURT IS A MATTER PECULIARLY WITHIN THE DISCRETION OF THE TRIAL COURT AND IN THE ABSENCE OF ABUSE OF DISCRETION SHOULD NOT BE REVERSED.

Since Bruno Agostino and Stanley Socha have been referred to as appellees throughout this brief they will be so referred to in answering their cross-complaint.

The contention is made that the District Court's allowance of $250 for attorneys' fees is inadequate in this case. As stated in 20 C.J.S. 462:

> "If the amount is not prescribed by statute or agreement, the Court has the power, within the limits of judicial discretion, to fix the amount of the attorneys' fees; and unless it is shown that the Court has abused its discretion, the reviewing Court will not interfere."

This honorable Court has stated:

> "The further point, in connection with the allowance of this attorney's fee, that there was no evidence as to a reasonable amount, is not open to examination. If it were, we would be inclined to hold that the court is as good a judge of reason-

ableness of attorney fees for services in that court as anyone."

Forno v. Coyle, 75 F. (2d) 692.

Clearly the District Judge was well able to judge a proper attorneys' fee in this case, and there is no abuse of discretion in that regard so as to warrant a reversal on that point.

II.

APPELLEES' CONTENTION THAT INTEREST IS ALLOWABLE PRIOR TO THE DATE OF JUDGMENT IS INCORRECT SINCE SECTION 25-1-1, ACLA, 1949, PROVIDES THAT INTEREST IS PAYABLE ON MATURED ACCOUNTS FROM THE DAY THE BALANCE IS ASCERTAINED, WHICH IN THE SUBJECT CASE WAS THE DATE OF THE JUDGMENT.

Although counsel for appellees contend that they were entitled to interest from the date of the alleged sale to the date of the judgment, it is noted that no cases are cited in support of this contention. Section 25-1-1, ACLA, 1949, is the Alaska Statutory provision for the allowance of interest.

This section provides:

"Legal Rate of Interest. The rate of interest in the Territory of Alaska shall be six per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; provided that judgments and decrees hereafter rendered founded on contracts in writing providing for the payment of interest until paid at a specified rate exceeding six per centum per annum, and not exceeding ten per centum per annum, shall bear interest at the

rate specified in such contracts, provided that such interest rate is set forth in the judgment or decree; on money received to the use of another and retained beyond a reasonable time without the owner's consent expressed or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due where there is a contract to pay interest and no rate specified. But on contracts, after passage and approval of this Act, interest at the rate of eight per centum may be charged by express agreement of the parties, and no more."

This statutory provision is identical with that provided in the 1913 Session Laws of Alaska, c. 17, except for a reduction in the amount of interest allowable. This honorable Court has interpreted the statute as follows:

"It is clear that in the amendment of 1913 the Alaskan Legislature intended to provide: First, for interest at 8 per cent on all money after the same became due; second, for 8 per cent on judgments and decrees for the payment of money unless the judgment was based upon contract providing for more than 8 per cent and not exceeding 12 per cent when the judgment was to bear interest at the contract rate to be specified in the decree. The balance of the sentence fixes the time when the money becomes due, within the meaning of the first clause of the section."

New York Alaska Gold Dredging Co. v. Walbridge, 38 F. (2d) 199 at page 205.

The statute provides that interest is payable "on money due on the settlement of matured accounts

from the day the balance is ascertained." Although appellant contends that no amounts should be due, even though the judgment of the Court below were considered to be correct, the balance due was not ascertained until the date the judgment was rendered; so that, in any event, interest only runs from that date.

CONCLUSION.

It is respectfully submitted that appellees' cross-complaint should be regarded as naught; and that, because of the erroneous verdict and errors committed, the judgment of the District Court should be reversed and the case remanded to the Court for entry of a judgment in favor of appellant.

Dated, Juneau, Alaska,
June 9, 1950.

Respectfully submitted,
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